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CHATTEL MORTGAGES UPON FIXTURES

By LOUIS A. HELLERSTEIN *of the Denver Bar*

THE enormous growth throughout the United States of installment purchases has brought to the fore many interesting as well as controversial questions. As controversial as any is the question of the rights of a holder of a chattel mortgage upon fixtures, where real estate mortgagees or subsequent purchasers are involved. Concerning this subject one can by a search of the authorities find support for almost any theory urged. An utter lack of harmony exists among the courts and their opinions are based upon conflicting theories, grounds and reason.

The early authorities laid down the rule that whatever was annexed or affixed to the realty became a part of it. Exceptions soon arose to meet "modern exigencies of trade and commerce." (Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237.) The question is further complicated by the fact that courts have altered their views as to the circumstances and the tests to be applied in determining when chattels retain their character as such and when they become fixtures, so as to become a part and parcel of the realty.

For illustration, in Colorado the original test laid down by the courts to determine what is a "fixture" was the *permanence* of its *attachment*. This is illustrated in the case of Vaughn v. Grigsby, 8 C. A. 373, 46 P. 624, which involved a windmill erected upon realty. The decision was rendered in 1896, and the test suggested was, whether the mill was "*so attached to the land as* to be a part of it." The breaking away from this test is shown by the opinion in the case of Cary Hardware Co. v. McCarthy, 10 C. A. 200, 50 Pac. 744:

"Formerly the controlling question in deciding on which side of the line of division an article belonged was: Is there a physical attachment to the realty of a nature indicating permanence? If there was, it became a fixture. If not it was personal property and its disposition was governed by the law applicable to such property. * * * Now it is not absolutely necessary that in order to constitute a fixture, so as to take an article from without the line of personal property, it should be perma-

nently affixed to the freehold by physical attachment. This may or may not be the case. * * * The controlling questions now, in determining as to a large class of articles whether they partake of a real or personal character, are the intention of the party to make a permanent accession to the freehold, and the use to which the article is to be applied."

And in the later case of Dawson v. Scruggs-Vandervoort-Barney Co., 268 Pac. 584, 84 C. 152, a more liberal rule is stated, that:

"It is not now considered absolutely necessary that an article be actually attached to the free hold in order to make it a part of it."

The Colorado court again recognized the difficulties involved in fixture cases when as stated in the case of Rare Metals Co. v. Power Co., 73 Colo. 30, 213 P. 124, "No two cases are exactly alike and hence no general rule can be applied to every case."

Principally two situations arise which require determination as to the rights of a conditional vendor of chattels, such as a chattel mortgagee, where fixtures are involved. The word "fixture" is used here in its descriptive sense:

(1) *As against a prior and existing realty mortgage.*
(2) *As against a subsequent mortgagee or purchaser.*

In the first instance what usually occurs is that the owner of real estate purchases chattel property upon the installment plan to be affixed or attached to his property, while there is outstanding a trust deed or realty mortgage.

We are here discussing not such articles as doors or windows which integrate into the realty or improvement on the land, but such chattels as furnaces, gas ranges, refrigerators and the like, which between the original purchaser and lien holder by the instrument used, are made chattels, since chattel mortgages deal only with personalty, but as to the rights of a real estate mortgagee, or purchaser of the personal property or fixtures, as the facts may justify.

Let us now discuss the priority involved between the prior real estate mortgagee and the holder of a chattel mortgage which covers chattels annexed to the realty. That is to say, while the recorded real estate mortgage existed, the owner

of the fee title added chattels thereto and executed a chattel mortgage to evidence the balance of the purchase price. The general rule by a preponderance of authority is as follows:

"Where the removal of the fixtures will not materially injure the premises, a seller thereof retaining a lien thereon may assert his rights as against a prior mortgagee of realty."

This general rule was followed in Colorado in the case of Beatrice Creamery Co. v. Sylvester, 65 Colo. 569, 179 Pac. 154, in 1919. The facts in the Beatrice-Sylvester case were briefly as follows:

Sylvester owned a farm upon which the Wallace State Bank held a realty mortgage. Thereafter, Sylvester purchased from Beatrice Creamery Co. two silos and at the time of the purchase executed notes reserving title in the vendor until full payment. The notes also recited that the annexation of the silos to the land should not affect the rights of the vendor. The notes, which were, in effect, conditional sales contracts, were not of record nor acknowledged in accordance with the chattel mortgage statutes.

The silos were 24 feet in diameter and 40 feet in height, placed upon cement foundations. The weight of the silos held them in place and they were fastened to the foundation by cables and easily detachable. The value of the farm was not affected by the addition of the silos and *the silos were removable without material injury to the land.*

Under these facts the court sustained the lien of the vendor of the silos, even though its contract was a secret lien, stressing the factor involved in the case, *"That the silos were removable without injury to the land."* The reasoning of the court to arrive at its decision was:

"One already holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels or a mortgagee of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor." (Jones on Chattel Mortgages, 5th Ed., Sec. 133a.)

Stating the decision in the Beatrice-Sylvester case, just

discussed in another way, it would appear to be authority for a converse situation, namely, *that if the removal of the chattels would materially injure the premises the rights of the real estate mortgagee would be superior to that of the conditional vendor.*

The rule, under such circumstances and supported by the weight of authority, seems to be as follows:

> "Where the property sold has become so intimately connected with or embodied in that which is subject to the mortgage that to reclaim it would more or less disintegrate the property held by the mortgagee, the reservation of title is ineffectual as to preserve the rights of the seller as against the rights of the prior mortgagee of the realty." (13 A. L. R., note, page 473.)

In the case of Barbour v. Ewing, 16 Ala. App. 280, 77 So. 430 (1917), the Alabama courts held that a steam heating system, consisting of a boiler, the necessary piping, and radiators placed in a building, lost their character as personalty and became realty so that a lien to the conditional vendor was ineffective.

A similar ruling was announced by the District of Columbia in 1933, in the case of Buss Mach. Works v. Watsontown, 2 Fed. Supp. 758, where it was held that a conditional vendor of a sprinkling system installed in a building could not reclaim them as against a prior mortgage.

The California courts have placed their decisions upon another ground, as held in the case of Dauch v. Ginsburg (1931), 214 Cal. 540, 6 Pac. (2nd) 952, where it was stated that plumbing fixtures and heating equipment installed under a conditional sales contract in a hotel building, being attached to the rough plumbing by means of slip joints, threaded unions and flanges, was indispensable for use in the operation of the hotel and that the rights of the prior mortgagee of the realty were superior to those of the conditional vendor of the fixtures. The court stated *the plumbing and heating fixtures were permanent in character and absolutely essential to the purpose for which they were constructed.*

In the case of Holland Furnace Co. v. Suzik (1935), 180 At. 38, 118 Pa. Super. 405, the Pennsylvania court had before it a case involving a furnace conditionally sold. The court in this instance took into account the effect of removal of the

furnace upon the heating plant in the dwelling. It refused to recognize the lien of the conditional vendor of the furnace even though its removal would not materially injure the building. It laid down the following rule:

"The question is not whether a removal causes material injury to the building, but to the operating plant, which includes all machinery and equipment * * * in these modern days a dwelling house essentially consists of not only foundations, walls, roofs, etc., but lighting, heating, plumbing, and sewage disposal systems also are regarded as integral parts thereof. It is very generally known that very few houses are now constructed without provisions for installing of a furnace in the cellar. A heating plant is regarded as indispensable in this climate, and is usually considered a component part of a building. Although this furnace might be removed without serious injury to either the furnace or the house, its removal would have completely destroyed the heating system."

Many courts have refused to follow the decisions of the California or the Pennsylvania courts, namely, that if the chattels were essential to the building or its operation they became part of the real estate, and have adhered to the rule that "material injury to the freehold" is the proper test to apply. (Domestic Elec. Co. v. Mezzaluna (1932), 109 N. J. L. 574, 162 At. 722.)

This is illustrated by a Wyoming opinion where upon exactly the same facts involved as in the Pennsylvania case above cited, Holland Furnace Co. v. Suzik, the courts held contrary to the foregoing case and sustained the rights of the conditional vendor of a furnace applying the test that no damage would be done to the building. The case is that of Holland Furnace Co. v. Bird, 21 Pac. (2nd) 825 (Wyo.). The facts and reasoning of the court will appear from the following excerpt from the case:

"In the case at bar, the testimony on the part of both the plaintiff and defendant is to the effect that the furnace can be removed from the dwelling house without injury to the latter, the only things necessary to be done to accomplish the severance being to unscrew pipe unions as to the gas fuel feed, remove the smoke pipe from the heater by simply slipping it off the casting and disconnect the furnace from the hot and cold air pipes by slipping them apart, at the same time breaking the asbestos paper covering at the location of the joints. In all of the Holland Furnace Company cases cited above, where there were contracts with provisions similar to the contract at bar, and where the installation

processes were similar to that pursued in this case, it was held that the furnaces were removable as against a prior mortgagee or one occupying a similar situation. For example, in Industrial Bank of Richmond v. Holland Furnace Company, supra, the contract contained the clause, 'The furnace and piping in basement shall remain personal property at all times and the title thereto shall remain in us until final payment therefor, with the right in us to remove same in default of payment.' There appeared as facts in that case, that the 'furnace was set up in the basement of the residence but was not attached to the floor, being held in place by its own weight. At each connection with a hot or cold air pipe was a collar, two screws, and a wrapping of asbestos.'

"The plaintiff had no knowledge of the sales contract, and it was not recorded. On January 12, 1929, the residence was sold under the deed of trust, the plaintiff becoming the purchaser. The deed from the trustees recited a consideration of $300.00. Subsequently defendant asked permission of plaintiff to remove the furnace, which was refused. The court, in the course of the opinion, disposing of the legal questions involved, said:

"As the furnace was connected with the piping in such a manner that it could be detached without damage to the building, the intention of the parties when it was installed becomes the controlling factor in whether it became a fixture. Bronson on Fixtures, par. 21 (d); Ewell on Fixtures (2nd Ed.) 30, 31; Freeman v. Truax, 103 W. Va. 132, 136, 136 S. E. 697; Kanawha Nat. Bank v. (Blue Ridge) Coal Corporation, 107 W. Va. 397, 148 S. E. 383, and authorities cited on page 401. That intention as stated in the sales contract was that the furnace 'shall remain personal property' until paid for, with the right of removal in case of default in payment. The weight of modern authority upholds such a contract as against a prior secured creditor; particularly when he advanced nothing on faith of the annexation and the chattel annexed may be detached without impairing the creditor's original security. Bronson, supra, par. 29 (a); 26 C. J., p. 684, par. 49; 11 R. C. L. p. 1066, par. 9. The furnace was not paid for, so personal property it remained with the legal title in the defendant."

In a case decided in 1933, Hammel v. Mortgage Guarantee Co., 18 Pac. (2nd) 993, the California court held that gas radiators installed in an apartment house, attached to the pipes by threaded unions, could not be removed by a conditional vendee in face of a prior realty mortgage.

In the case of refrigeration the New Jersey courts, in McLeod v. Satterthwait, 109 N. J. Eq. 414, 157 At. 670, have distinguished between a complete installation in an apartment building, where a complete refrigeration system, including units, pipes and boxes was installed, and a case where merely units and cabinets were installed, connected with pipes

already in place. In the first case the court held the complete installation to be a part of the real estate and in the second situation the refrigeration was held to remain personal property.

The rule in Massachusetts is that in respect to prior mortgages of realty, an agreement between the mortgagor and the vendor of a chattel that the title to it shall remain in the seller, after it is affixed to the real estate, is invalid, the reason being that all fixtures are covered by the mortgage and the mortgage contract cannot be changed by an agreement to which the mortgagee is not a party. (Meagher v. Hayes, 152 Mass. 228 (25 N. E. 105).

Ordinarily, electric ranges, roll-about beds and similar chattels have been held to retain their status as personal property (Dunn v. Assets Realization Co. (1932), 141 Ore. 298, 16 P. (2nd) 370.

The fact that chattels are worn out and are replaced does not affect the rule followed in various jurisdictions; nor does the fact that the mortgagee of realty has a clause covering after acquired property of the mortgagor affect the rule in the respective jurisdictions. (Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209.)

The foregoing discussion relates to the controversies between mortgagees who have recorded liens upon real estate and claimants who claim a lien upon chattels subsequently annexed or attached to realty. Now let us discuss the rights of the parties where a recorded chattel mortgage is prior in time to the real estate mortgage or the real property is purchased by one without actual notice of the prior chattel mortgage of record.

If a subsequent mortgagee or purchaser of the realty has *actual notice* of the unpaid lien for fixtures, it follows that his rights are subject to the rights of the conditional vendor. This rule seems generally accepted. But whether the constructive notice of the recording or filing statutes amounts to such notice as to prevail, where a subsequent mortgagee or purchaser is involved, is again a proposition on which courts have not agreed. One line of authorities holds that *constructive notice* is as potent notice as *actual notice.* Other authorities declare that the vendor of chattels having consented that the property

sold be affixed or attached to realty, cannot thereafter question the same. The chattel having become realty, the record of a lien upon the chattels as personal property became inoperative and of no effect as to these third persons.

The majority rule, supported by logic and reason, would appear to be that *a purchaser or subsequent mortgagee of realty is bound only to search the record title of the realty and the record of any chattel lien would not be notice either constructive or actual under such circumstances.* (1 Jones Chattel Mortgages, Sec. 134—6th Ed.)

A citation of the opinions in some of the pertinent cases will illustrate the views of the various courts and their lack of harmony.

In the case of Abramson v. N. W. Penn. Co. (1928), 156 Md. 186, 143 At. 795, the court considered the matter of *gas radiators* in a dwelling and stated as follows:

(1) Does a conditional sales contract duly recorded under Article 21, par. 55, Code, afford to the purchaser of real property constructive notice that the title to articles described in such sales contract, which at the time it was made were chattels, but which at the time said real estate was purchased were so incorporated therewith as to become an integral part thereof, is reserved to the conditional vendor (a) when the character of the chattels is such that the conditional vendor must have known that they would in ordinary course be so used and converted; (b) where they were not of that character?

(2) Were the radiators involved in this proceeding, in fact, at the time appellant took title to the property in which they were located, so annexed to the realty as to become a permanent and integral part thereof?

(3) If the purchaser of the realty at the time of his purchase had constructive notice of the conditional sales agreement, will he be permitted to assert title to the chattels against the conditional sales vendor, whether the chattels were at that time integrated with the real estate or whether they were not?

The proposition first stated is novel in this court, and, while the question has not infrequently arisen in other jurisdictions, the decisions in respect to it are too conflicting to establish any rule which can be said to be generally accepted. Many courts of high standing have taken the view that the recordation of a chattel mortgage or a conditional sales contract, under a statute making such recordation constructive notice to third persons, is sufficient to charge a bona fide purchaser for value of real estate to which chattels are annexed with notice of any lien or title reserved in such mortgage or conditional sales contract to or against such chattels. Sword v. Low, 122 Ill. 487, 13 N. E. 826; Eaves v. Estes, 10

Kan. 314, 15 Am. Rep. 345; Keeler v. Keeler, 31 N. J. Eq. 181; Ford v. Cobb, 20 N. Y. 344; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 81; Monarch Laundry v. Westbrook, 109 Va. 382, 63 S. E. 1070. Other courts have taken the opposite view. Elliott v. Hudson, 18 Cal. App. 642, 124 P. 103, 108; Tibbets v. Horne, 65 N. H. 242, 23 A. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31; Brennan v. Whitaker, 15 Ohio St. 446; Phillips v. Newsome (Tex. Civ. App.), 179 S. W. 1123.

But such cases as Sword v. Low, supra, Eaves v. Estes, supra, limit the application of the rule that recordation of the chattel mortgage or conditional sales contract is constructive notice to a purchaser or subsequent mortgagee of realty to which the chattels described in the chattel mortgage or sales contract are annexed to cases *where the chattels are of such a character that they may be removed without damage to the freehold, and where their* essential utility does not require that they *should be so annexed to the freehold as to become a part thereof.* So that they are consistent with the theory that, where the nature of the chattels is such that, if used for the purpose for which they were made, they would naturally and necessarily be annexed to and become a part of some freehold, such recordation would not be constructive notice to the purchaser of such real estate. That limitation is very precisely illustrated by the case of Keeler v. Keeler, supra, where a chattel mortgage duly recorded was held to afford constructive notice to a subsequent mortgagee of the mortgagee's lien against such chattels, as spinning frames, etc., but no notice at all to such mortgagee of a lien reserved against a steam boiler, which had been so annexed to the realty as to become incorporated therewith. The weakness of that position seems to be that it rests upon no surer foundation than casual and subjective opinion as to the character of a given article, and affords little security either to the vendor of the chattel or the purchaser of the realty, nor has it any logical basis in reason or technical law.

On the other hand, Elliott v. Hudson, supra, Tibbets v. Horne, supra, Brennan v. Whitaker, supra, and Phillips v. Newsome, supra, take the position that, if the chattel has with the knowledge of the vendor been sold to be annexed to real estate and has been so annexed, the purchaser of such real estate is not affected by the recordation of a chattel mortgage or conditional sales contract, reserving to the conditional vendor, or the mortgagee of the chattel, any title or lien to or against it, on the ground, that if in fact the property has become a part of the freehold, it has ceased to be a chattel, and that the record of the chattel mortgage or conditional sales agreement ceased to afford constructive notice of the creation of the lien or the reservation of title at the time when the article ceased to be a chattel and became real property. And that seems to us the sounder conclusion, and one more consistent with the legislative policy of this state * * * The radiators were so far as the record shows, ten separate heating appliances, having no more connection with the freehold than an ordinary gas heater, portable kitchen range or heating stove, which are certainly by the weight of authority, held not to be fixtures. Ewell on Fixtures, p. 300. Such

cases as Keeler v. Keeler, 31 N. J. Eq. 181, are not in point, for while the pipes to which the court referred in that case were readily removable without damage to the freehold, they constituted a necessary part of a heating plant which itself was a part of a freehold * * *.

Inasmuch as the chattels retained their character as personal property, and since it was admitted that they were described in the conditional sales contract under which the appellee retained title to them and that such contract was duly recorded, such recordation was sufficient to charge appellant with notice of the fact that the vendor retained title to them.

A case of interest is that of Lasch v. Columbus Heating and Ventilating Co. (1932), 163 S. E. 486, 174 Ga. 618, which involved a furnace and its fixtures sold under a conditional sales contract duly recorded and the rights of a subsequent purchaser of the real estate without actual notice. The furnace was installed in such a manner that it could be removed without material injury to it or the realty.

The holding of the Court sustained the rights of the conditional vendor upon the ground that recording of his instrument *was notice even though constructive,* of his unpaid balance. The court's ruling is as follows:

"Our statute provides for the record of retention-title contracts, and makes such record notice to the world * * * These statutes furnish easy and available means by which an intending purchaser of real estate can acquire notice of the existence of all retention-title contracts between the owner and other parties; with this information prospective purchasers can determine whether chattels attached to real estate are held by the owner thereof under retention-title contracts. The duty imposed upon prospective purchasers of realty to make such investigation and inquiry does not impose upon them any very onerous burden; certainly not such a burden as would justify the destruction of the rights of sellers of articles under retention-title contracts duly recorded. There are cases holding to the contrary of what we rule, but we are of the opinion that our ruling states the true law upon this subject."

In the case of North Shore Co. v. Broman (1933), 247 N. W. 505 (Minn.), the court sustained a recorded conditional sales contract upon boilers, and heating and plumbing equipment installed in a building as against a subsequent mortgage of the realty, applying the sole test and placing its ruling upon the ground that "the removal could be made without substantial injury to the realty."

In some cases the courts have held that the chattels, although affixed to the realty, may retain their intrinsic character

as personalty. An illustration of this is the case of Gardner v. Buckly and Scott (1932), 280 Mass. 106, 181 N. E. 802, which involved an oil burner used for heating a dwelling, set upon and inside a boiler upon four lets, removable by unscrewing and an oil storage tank resting on a cement floor. Under such circumstances the court found the chattels still retained their character as such and upheld the claimants to them.

Now as to the probable rule in Colorado, first as the rights of the parties where a prior realty mortgage is involved and a subsequent chattel mortgagee of fixtures. The proponents representing the holder of the chattel mortgage would no doubt place great stress and urge the case of Beatrice Creamery Co. v. Sylvester, 65 Colo. 569, as definitely adjudicating their rights as superior to the real estate mortgage. It is true that such a general rule was announced, but upon facts which clearly disclosed that the silo was easily removable. Should this same rule apply to such fixtures as a furnace, which might be removable without material injury to the freehold? In my opinion the better rule to follow would be the California rule, which I have previously discussed, namely, that even though the furnace is removable without material injury to the freehold, in this modern day it is an *essential* part of a house and a house without a furnace or other heating equipment greatly impairs its use as such.

What rule should govern in Colorado where the facts disclose a valid recorded or filed chattel mortgage upon, for lilustration, a furnace, and a subsequent realty mortgage or purchaser? The weight of authority seems to be the better reasoned rule, namely, that the subsequent mortgagee or purchaser is bound only by the *recorded instruments relating to realty* and is not bound to search the *chattel mortgage records* to see if chattels affixed to the realty have liens outstanding.

As to these controversial questions, until the Supreme Court of our state announces a definite rule to follow, either party may find ample support for his position and urge the same, well fortified with decisions of high courts of many states.

OF INTEREST TO THE BAR

The University of Denver and the Foundation for the Advancement of the Social Sciences are pleased to announce a series of lectures on

BEHIND THE STORM OVER ASIA

to be given by Professor Grover Clark, who has recently joined the economics faculty of the University.

Professor Clark is widely recognized as one of the leading authorities on the Far East. His knowledge of Far Eastern peoples and their problems is based on long personal contact. Although born in Japan, he received his formal education in the United States. In 1918 he returned to Japan to teach in the government schools and to do magazine work. After two years he went to China, where he lived for the next ten years. During this time he was a professor in the National University of Peking, editor of the leading English-language newspaper in North China, "The Peking Leader," and correspondent for the "Christian Science Monitor." He also served as associate director of the China International Famine Relief Commission in 1928-30.

Since his return to the States in 1930 Professor Clark has been much in demand for lectures on Far Eastern affairs. His books have received wide acclaim. Outstanding among them are: "Economic Rivalries in China," "The Great Wall Crumbles," "A Place in the Sun," "The Balance Sheets of Imperialism."

The subjects and dates of the lectures are:

	NOON	EVENING
"The West Goes to the East"	Oct. 4	Oct. 5
"Advancing Japan"	Oct. 11	Oct. 12
"Resurgent China"	Oct. 18	Oct. 19
"Far Eastern Problems for Americans"	Oct. 25	Oct. 26

Each lecture will be given twice. The noon meetings will be in the Y. W. C. A. Auditorium, beginning promptly at 12:30 and closing at 1:30. Those attending should secure luncheon either before or after the lecture. Seats will be reserved until 12:25 for those holding tickets of admission, which may be secured without charge by telephoning (SPruce 2717) or writing to the Foundation office, University of Denver. The evening meetings will be in the Memorial Chapel, University Park campus, beginning promptly at 8:15 p. m. Admission will be without ticket.

DAVID SHAW DUNCAN, *Chancellor,*
BEN M. CHERRINGTON, *Director.*

"Know the Laws of your State"

FINAL NOTICE BEFORE SUIT

State of Colorado, }
County of Pueblo, } ss.

R. W. T. MOTORS, Creditor
vs.
R. H. K.....Y, Debtor } FINAL NOTICE

To the above named Debtor:

FIRST: You will please take notice that the above-named Creditor claims you are indebted to them in the sum of $15.48.

SECOND: Although duly demanded the same has not been paid, nor any part thereof.

THIRD: *Now, Therefore,* unless you remit on or before the 14th day of April, A. D. 1936, at 2 o'clock P. M. of said day in payment of said claim, or make satisfactory arrangements for adjustment thereof, suit will be brought forthwith for the total amount with interest, together with all Costs and Disbursements of the Action.

Dated at Pueblo, Colorado, this 4th day of April, 1936.

BUSINESS MEN'S COLLECTION BUREAU, INC.
(Legal Department)
[SEAL] By E. W. MILLER.

Mail Check or Money Order Today to BUSINESS MEN'S COLLECTION BUREAU, INC., 222 Colorado Building, Phone 3735, Pueblo, Colo.

"To avoid trouble obey the laws"

Brother, practice what you preach!

With respect to the italicized quotations at the top and bottom of the foregoing notice, we quote "the laws of your State" which the "legal department" apparently overlooked, to-wit:

1756 CRIMES Chap. 153

Sec. 6791. Simulating judicial process.—Sec. 159. It shall be unlawful to issue, execute or use, or to serve upon, send to or deliver to any person or persons, any writing or document so arranged or devised or used as to simulate or resemble any legal process unless such writing or document is the genuine act or proceeding of a justice of the peace or of any court or was authorized by law to be issued in his or its behalf or as his or its process. L. 21, p. 239.

Sec. 6792. Penalty.—Sec. 160. For every violation of the foregoing, the punishment shall be a fine of not to exceed one hundred dollars or imprisonment for not to exceed thirty days, or both, in the discretion of any judge of competent jurisdiction. Such jurisdiction is hereby specifically conferred upon justices of the peace. L. '21, p. 239.

Dictaphun

MILK FROM CONTENTED COWS

One of our valued contrib'rs noticed the following ad of a personal loan company, to-wit: "Guarantee! If you are not entirely satisfied with your loan in every way, just return the money borrowed within ten days from the date of your loan and no charge will be made. 140,000 satisfied customers!!!"

Horace Hawkins, Jr., queries (he would): "Does the above phraseology mean that no charge will be made for returning the money?"

ALWAYS CHANGE YOUR VENUS!

No. 14203. Wagner, etc., vs. People ex rel. McKenzie et al. County Court of Boulder County. Hon. E. J. Ingram, Judge. Affirmed.

FACTS: Plaintiff in error is county superintendent of schools for Gilpin County. She moved for a change of venus and filed a special demurrer in response to an alternative writ of mandamus issued by Boulder County Court to unite with Davis, Boulder County superintendent of schools, in establishing and number a school district to be formed out of two established school districts, which lie partly in the two counties. An adverse ruling was had on the motion and demurrer and she applies for supersedeas.—*From our esteemed contemporary, The Colorado Graphic.*

A man excitedly entering a young lawyer's office, exclaimed: "A cat sits on my back fence every night and yowls and yowls, but I have lost my patience. Have I the right to shoot this cat?"

"I would hardly think so," replied the young lawyer. "The cat does not belong to you, as I understand it."

"No, but the fence does."

"Then," concluded the young lawyer, "I think you have a perfect right to tear down the fence."—From *Legal Chatter.*

Supreme Court Decisions

PARTNERSHIP—DEMURRER—FEDERAL PERMITS—JURISDICTION OF THE DEPARTMENT OF THE INTERIOR—*McNulty et al. vs. Kearin*—No. 13986—*Decided June 14, 1937—District Court of Huerfano County—Hon. A. F. Hollenbeck, Judge—Affirmed.*

FACTS: The judgment for review was a decree whereby the court charged a certain federal coal prospecting permit—standing in the name of the defendant, McNulty, as executrix under the last will and testament of Peter Fern, deceased—with a trust, as to a one-half interest therein, in favor of the plaintiff, Kearin, defendant in error. Fern had been a co-partner of plaintiff's with a view to the ownership, leasing, prospecting, development and operation of coal lands. In 1925 they jointly acquired from the United States a coal mining lease on a tract of 240 acres, and in 1927, they jointly procured from the United States a coal prospecting permit on a tract of 360 acres adjacent to the other tract. This permit was thereafter renewed, expiring March 5, 1931. About a week prior to the expiration of the permit, Fern commenced an action to dissolve the partnership existing between himself and Kearin. On April 18, 1931, while the action was pending, Fern applied to the United States for a new coal prospecting permit in his sole name on the land covered by the original permit granted to him and Kearin jointly. On June 19, 1931, Fern died. Fern's application for a new permit was duly kept alive by proper extensions officially granted for the payment of the $350.00 rental, which Kearin claims he eventually paid the government. The defendant requested that the permit applied for by Fern be issued instead to her. Kearin filed a protest in the land office against the issuance of such a permit to the defendant, setting forth his claim as a partner, but the Department of the Interior properly ruled that it has no jurisdiction over equitable issues and dismissed the protest. The permit received by and in the name of the defendant as executrix was the property right subjected in the trial court to the declaration of trust that was complained of.

HELD: 1. All legal and equitable claims of Kearin's were not finally adjudicated in the partnership dissolution action brought by Fern because that complaint did not deal in any way with the coal prospecting permit for which Fern had applied and which was issued—nearly six months after entry of the decree—to his estate, represented by the executrix.

2. The overruling of a demurrer for alleged misjoinder of parties is immaterial, whether it has merit or not, if the defendants plead over, for it waives any error in connection therewith.

Opinion by Mr. Justice Bouck.

OIL AND GAS—NONSUIT—WAGE ACT—ORIGINAL UNDERTAKING—RATIFICATION—STATUTE OF FRAUDS—*The Mayer Oil Company et al. vs. Schnepf*—No. 14017—*Decided June 7, 1937—County Court of Larimer County—Hon. Albert P. Fisher, Judge—Affirmed.*

FACTS: The parties shall hereinafter be referred to as they appeared in the trial court: Defendant in error as plaintiff, and plaintiffs in error as defendants. Action was brought by the plaintiff to recover for services rendered and labor performed by himself and his assignors in connection with certain oil well drilling operations. At the conclusion of plaintiff's case the court denied defendant's motion for nonsuit and defendants elected to stand upon the motion. Judgment was thereupon entered in favor of the plaintiff. The plaintiff and his assignors were employed by Mosher, the contractor, to work upon the well, and on January 24, 1932, he was indebted to them for back wages. The plaintiff and his assignors suspended work and refused to continue until they were paid. Thereupon there was executed an original agreement and undertaking on the part of the defendant companies to pay the plaintiff and his assignors for their labor, which was for the purpose of inducing the men to return to work on the land which the companies were interested in. The complaint further alleged liability against the defendants under the provisions of the "wage act" which renders the defendants liable by operation of law, to employees of a contractor for work done for the private corporations. The defendants questioned the constitutionality of this act and also contended that plaintiff's cause of action, in so far as it was based upon said act, was barred by the one-year statute of limitations.

HELD: 1. A motion for nonsuit admits the truth of the evidence produced by the plaintiff in the sense most unfavorable to the defendants and every inference of fact legitimately deductible therefrom.

2. The fact that the subsequent payments to the men were made from the funds of one of the companies might well indicate the promise was made on behalf of the corporations and ratified by them.

3. When the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

Opinion by Mr. Justice Knous, Mr. Justice Hilliard not participating.

NEGLIGENCE, CONTRIBUTORY, PER SE—EVIDENCE—STATUTES, INTERPRETATION OF—*Grunsfeld vs. Yenter*—No. 14088—*Decided June 1, 1937—District Court of Weld County—Hon. Frederic W. Clark, Judge—Affirmed.*

FACTS: The parties will be referred to as they were in the trial court, where the plaintiff, defendant in error, recovered judgment against the defendant in the sum of $541.50 for personal injuries caused by defendant's alleged negligent operation of his motor vehicle. About 7:00 o'clock on the evening of July 12, 1935, while the plaintiff was

driving his automobile in a southerly direction along the Greeley-Denver highway at a speed of approximately 35 to 40 miles per hour, he ran into the rear end of the defendant's automobile, which was standing on the pavement, headed in the same direction. There had been a heavy shower and defendant had stopped his car during the heaviest part of the rain. Because of the rain the defendant's car would not start, and he was sitting in his car trying to start the engine at the time of the impact. The shoulders along the highway were well graveled and the ditch alongside of them was not over two feet deep. Plaintiff admitted that he saw defendant's car about a block and a half away, but assumed that it was proceeding in the same direction as his own at the usual rate of speed and states that he did not realize until a few "instants" before the crash that defendant's car was standing still. The question involved was whether or not the plaintiff was conclusively guilty of contributory negligence under Sections 73 (a), c. 122, S. L. 1931, p. 532.

HELD: 1. The courts retain the duty of giving the statute a reasonable interpretation, because it cannot be maintained that failure to comply literally with all the provisions of the statute in all circumstances constitutes negligence *per se*.

2. "A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required."

3. Where the evidence is conflicting, findings thereon will not be disturbed, since every inference fairly deducible from the evidence is drawn in favor of the judgment.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

FUTURE INTERESTS—INTERPRETATION OF ISSUE—LATENT AMBIGUITIES—WATER RIGHTS—DEEDS—APPURTENANCE—*Haselwood vs. Moore et al.*—No. 13897—*Decided June 1, 1937—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: In assertion of her rights, claimed by virtue of a vested remainder, plaintiff in error, as plaintiff below, brought suit in ejectment against possession under a life estate which had terminated. Complaining that the trial court erroneously determined that she was entitled to a two-thirds interest only in the land, and to none of certain claimed water rights, she assigned error to the judgment. She prayed for damages for the wrongful detention and use of the premises after the termination of the life estate and was awarded judgment therefor in the sum of $730.47, to which Alice T. Moore, one of the defendants in error, assigned cross error. Prior to August 9, 1901, George H. Church was the owner in fee simple of certain land. In his lifetime he had much to do with acquiring water rights and ditches for conveyance thereof in that particular locality where his land was situated. On the above date he conveyed the property to his daughter, Mary C. Tucker, by quitclaim

deed, which on its face clearly conveyed a life estate to Mary C. Tucker with remainder to her issue, if any. If no issue, the property to revert to the grantor or his heirs. He did not say, "children living at the time of her death" or "children living at the time of the execution of the deed." His deed was silent in respect to water rights, but it did make a reservation from the conveyance of land occupied by a lake or such land as might be occupied by future enlargements, and a special reservation of the land covered thereby, and for a right of way for an irrigating ditch crossing the land. On the death of Mary C. Tucker the property descended to her two living children, Alice T. Haselwood and Alfred R. Tucker, and to the heirs of Eleanor Tucker Truder, who predeceased Mary. These latter children, heirs of Eleanor, claim a one-third interest in and to the property. After the death of Mary, Alfred C. Tucker, her son, quitclaimed his interest in the land to his sister, Alice T. Haselwood. Plaintiff contends that she thereby became entitled to the entire remainder of the lands, upon the theory that it was the grantor's intention that the remainder rest only in children of, and surviving, Mary C. Tucker at the time of her death. She also contends that under the "appurtenance" clause of the deed the grantor intended to and did convey 50 inches of water with the land.

HELD: 1. Findings on the facts upon disputed questions will not be disturbed on review.

2. The deed contains no latent ambiguities, and therefore leaves no room for oral testimony in explanation thereof or to vary its terms.

3. Under the terms of the deed issue meant children and children's children.

4. The court will not by implication do for a grantor that which was easily within his power to so express and grant.

5. There was no conveyance of any water by the deed and it was not sufficiently shown that any water ever was used on the land, so as to bring it within the category of an appurtenance.

6. Any arrangement or agreement to take possession of the premises and receive the rents and profits, could exist no longer than the life estate of the party granting such privilege.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

SUPREME COURT RULE NO. 32—ASSIGNMENTS OF ERROR—*Smookler vs. Nicoll Bros. Oil, Inc.*—No. 14107—*Decided June 7, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Affirmed.*

HELD: That the assignments of error: "that judgment is contrary to the law" and "that judgment is contrary to the evidence," are no compliance with Supreme Court Rule No. 32 and present nothing for review.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

TORTS—DAMAGES, MINIMIZING—GRATUITOUS HOSPITALIZATION—FAMILY CARE—*City of Englewood vs. Bryant*—No. 14018—*Decided May 24, 1937—District Court of Arapahoe County—Hon. S. W. Johnson, Judge—Reversed.*

FACTS: Plaintiff brought action against the city, claiming damages in the sum of $400 for medical attendance, hospitalization and nursing, plus $5,000 for physical injuries, pain and suffering, all occasioned by a fall on a defective sidewalk. On a verdict in her favor for $2,700, judgment was entered. To review that judgment the city prosecuted error.

HELD: 1. It is the duty of the injured party to minimize damages by reasonable care and obedience to medical directions if circumstances are such as to make it possible to do so.

2. Where an injured person has been cared for gratuitously by a hospital belonging to the county and state, and her possible liability for this care, to the state, is so remote as to be purely speculative, she will not be allowed to recover this expense from the defendant.

3. Where the injured party has been cared for by her mother, the city cannot claim the benefit of her mother's gratuitous service, but must pay for the services so rendered.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

EQUITY—TESTAMENTARY DISPOSITION OF PROPERTY—CAPACITY—BURDEN OF PROOF—*Burton et al. vs. Burton et al.*—No. 14030—*Decided June 1, 1937—District Court of Denver—Hon. H. E. Munson, Judge—Affirmed.*

FACTS: This was a suit brought in equity to set aside certain transfers of property made by Burton to the defendants before his death. This was a case of an elderly, ill, but as the evidence brought out, mentally competent man, still hoping and expecting recovery, concluding to finally dispose of his property, and deliberately choosing between a wife in name only, of some twenty months, whom he did not greatly trust, and adult children by a former marriage, whom he loved and trusted. The wife's case rested primarily upon the alleged mental incapacity of her husband. The trial court found against her and gave defendants judgment for costs.

HELD: 1. The burden of proof to show alleged improper influence is upon he who asserts it.

2. Blood relationship alone is insufficient to support a claim of special trust and confidence so as to place the burden of proof upon the defendants.

3. The Supreme Court assumes the correctness of the findings of fact made on conflicting evidence by the trial court.

Opinion by Mr. Chief Justice Burke. Mr. Justice Knous and Mr. Justice Holland concur.

WILLS — TESTAMENTARY TRUST — EQUITABLE CONVERSION — INTEREST METHOD OF DETERMINING AVERAGE INVESTMENT AND NET PERCENTAGE INCOME—*In re: Estate of Fred Herrington, deceased. Donaldson, etc. vs. Herrington, etc.*—No. 13935—*Decided June 21, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Modified and Affirmed.*

FACTS: Herrington, testator, bequeathed the sum of $30,000 in trust for the use and benefit of two nieces. The bequest provided that the sum be invested in income-bearing securities and that the income be paid over to the beneficiaries, and that trustee be at liberty to use any part or all of the principal necessary for the maintenance and education of the nieces. The trust fund was not set up or segregated from the estate, nor were any securities, legal for investment of trust funds, set aside for the fund. Since the will was admitted to probate, the nieces have received in excess of $29,000. The newly appointed trustee demands that the executors treat the $30,000 bequest as equitably converted, as of the date of death of the testator, into such securities as are authorized by statute (Sec. 5269, C. L. 1921), and that the trustee be paid $30,000 plus whatever income thereon on the unpaid balance at the rate said converted fund would have earned if it had been converted into securities legal for investment of trust funds under the laws of Colorado, less any prior payments made to the beneficiaries or their trustee. The County Court held that there was an equitable conversion of the funds and that the interest considered earned would be the same as the entire estate earned after deducting from the gross income, legal expenses and executors' fees, in arriving at the net figure used in the computation of the interest.

HELD: 1. The Colorado statute (Sec. 5269, C. L. 1921) does not provide for any minimum rate of interest at which funds of a deceased person's estate shall be invested, but enumerates a number of types of securities, including U. S. Government Bonds, which shall be deemed legal investments, but the income of such government bonds is not necessarily the legal yardstick to be applied in determining the amount of income to which the trust fund is entitled.

2. Where it appears that the investments of the estate funds were not injudicious or ill-advised and it was the undoubted intention of the executors in the interest of all the beneficiaries that the property of the estate be so invested, safety considered, as to bring in as large an income as could be obtained, it is fair and just to use that income as the basis for the income which should have been derived on the trust fund provided for in the will.

3. "The rate of interest should be such as a trustee by careful, conservative investment in suitable trust investments could reasonably realize as interest or income."

4. In determining the average investment to be used in ascertaining the net percentage income on the estate as a whole, it was not error for the trial court to include nearly $41,000 worth of nonincome pro-

ducing items in an estate, such as this, where the average investment was over $127,000.

5. The items of legal expenses and executors' fees should not have been deducted from the gross income in arriving at the net for the purposes of this computation. The expenses of administration are not chargeable against a money legacy where the residuary corpus is sufficient to pay such items.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Bakke concur.

WILLS—CONSTRUCTION—*Mellor et al. vs. Bennet et al.*—No. 14036—*Decided June 21, 1937*—*District Court of El Paso County*—*Hon. John M. Meikle, Judge*—*Affirmed.*

HELD: 1. Where the intention of the testator can be reasonably learned from an examination of the entire will, such intention must govern.

2. Will considered and determined that the construction adopted by the District Court (that the true residuum of the estate begins with sub-section (3) of Article V of the will, and that all costs of administration, including court costs, attorneys' and executors' fees and taxes must be paid from the assets contained in said sub-section (3) of Article V, if the assets contained therein are sufficient to pay such charges, and not out of the specific bequests found in prior clauses in the will) is the more natural and reasonable one.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

MORTGAGES — TRUST DEEDS — LIENS — PREFERENCE — ASSIGNMENTS—GARNISHMENTS—RENTS AND PROFITS—REAL ESTATE—TRUST DEED AS CHATTEL MORTGAGE—*Fisher, etc. vs. Norman Apartments et al.*—No. 13963—*Decided June 21, 1937*—*District Court of Denver*—*Hon. James C. Starkweather, Judge*—*Reversed.*

FACTS: B executed deed of trust to the International Trust Company covering certain property on which the Norman Apartments are now situated securing a bond issue of $350,000. Later the property was conveyed by B to Norman Apartments, Inc., which assumed and agreed to pay the encumbrance. Thereafter, a judgment was obtained against the apartments and assigned to plaintiff. Subsequently, an agreement was entered into between B, the Norman Apartments, Inc., and certain persons constituting a "bondholders' protective committee," to have the resident manager, E, of the apartments, continue to collect rents and manage the apartments and pay into the Colorado National Bank such funds and to pay the ordinary bills in connection with such management by check, countersigned by a representative of the bondholders' committee, and drawn on such funds. Foreclosure of the Trust Deed was instituted but no receivership was demanded. After the decree of foreclosure was entered, execution and garnishment on the judgment

was issued and garnishee summons served on E and the Colorado National Bank, who answered the negative. The International Trust intervened, claiming the property and funds in the hands of the bank and E. The plaintiff traversed the answers, and from a judgment on the traverse in favor of the garnishees and on the petition in intervention in favor of the trust company, plaintiff prosecutes writ of error.

HELD: 1. The contract was not an assignment of rents. E, the resident manager, was the agent of the Norman Apartments, Inc., and the moneys were collected for the benefit of the Norman Apartments, Inc., in the manner usual before the execution of the contract, and this is consistent with possession remaining in the corporation and inconsistent with either an assignment of the rents or bills receivable or a surrender of possession to the bondholders' committee. The contract was a restriction on expenditures which might voluntarily be made by the manager, and it did not pass title to the funds or determine the rights of the judgment creditors to proceed against them for satisfaction of their claims.

2. The assignment of rents in the trust deed did not give the mortgagee a right to such rents except under certain definite conditions. The mortgagors did not abandon possession, nor was a receiver appointed.

3. A mortgagee before entry has no specific lien upon the rents. He must first take possession under the mortgage.

4. Even when the mortgage expressly covers the land, "together with rents, issues and profits," the language will be construed as referring to rents and profits accruing after entry by mortgagee, in absence of specific language pledging the rents accruing before default while mortgagor is in possession.

5. "The contract itself did not constitute a preferred payment; it was but the means by which a preference was intended later to be effected." There is a vast difference in law between an order to pay a debt out of a particular fund and promise to pay out of such fund. " 'An agreement to pay out of a particular fund, however, clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund—*any authority to collect, or any power of revocation. If he does, it is fatal to the claim of the assignee.*' "

6. Where a trust deed contains a provision that any personal property owned or thereafter acquired and used by the grantors in the conduct of a hotel business in the buildings, without specifically describing it, it is subject to the same rules as a chattel mortgage for as to such property it is a chattel mortgage, and the personal property must be so described that it may be identified or possession taken prior to service of such garnishment—as to such property it was not notice and it was void as to the judgment creditor.

Opinion by Mr. Justice Young. Mr. Justice Hilliard not participating. Mr. Justice Bouck dissenting.

WATER RIGHTS—PRIORITIES—MAP AND STATEMENT—*The San Luis Roller Mills vs. The San Luis Power and Water Company*—No. 13909—*Decided June 14, 1937*—*District Court of Costilla County*—*Hon. John I. Palmer, Judge*—*Reversed.*

FACTS: The action involved a controversy between two claimants in a general water adjudication.

HELD: 1. As between two rival claimants, both having failed to come within the exact provisions of the statute, i. e., in not having filed a map and statement within the period prescribed by statute, the relative priorities of the claims are properly determined by the dates on which the particular appropriations were respectively consummated by actual diversion of the water.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

INSURANCE—TOTAL DISABILITY—USUAL OR ORDINARY WORK—COMPENSATION FROM WORK AS AFFECTING TOTAL DISABILITY—*Denton vs. The Prudential Insurance Company of America*—No. 13977—*Decided April 4, 1937*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: The parties hereinafter will be designated as plaintiff and the insurance company. Action brought by plaintiff upon the total disability clause of a group policy contract of insurance carried by plaintiff's employer, and was based on a heart condition which allegedly caused him to be totally and permanently disabled within the meaning of the contract. Plaintiff was a collector for the insurance company. On April 30, 1933, while playing baseball at a Sunday School picnic, he suffered a heart attack and fainted. Following his illness, the company took some of his territory away and some of his associates helped him with minor parts of his work, but he continued working with no decrease in compensation until he was discharged for an alleged shortage in his accounts on February 9, 1935. At the trial, plaintiff's counsel offered to show the plaintiff was not short in his accounts, which offer was denied, and he did not offer any evidence to show that he was dismissed on account of his physical condition. At the close of the plaintiff's case in the District Court, the insurance company filed a motion for a nonsuit, which was granted and the action dismissed.

HELD: 1. Total disability does not mean absolute helplessness; it is enough to meet the requirements of the insurance contract if the insured is entirely incapacitated for work or business.

2. Contracts of insurance are to be construed most strongly against the company and liberally construed in favor of the insured, but the court may not substitute an entirely different contract from that which the parties have entered into.

3. The insured may not be regarded as totally disabled as of a time when, although sick, diseased, injured, or otherwise afflicted, he continues to do his ordinary work, or is regularly performing his usual

and customary duties. The plaintiff admits continuing his usual work at substantially the same compensation up until the time of his discharge, and, therefore, the jury would not have been justified under the law in rendering a verdict in any amount for the plaintiff.

4. Disability to engage in any occupation and perform any work for compensation or profit as set forth in an insurance contract contemplates that the compensation for profit to be received from the occupation engaged in, or work done, shall in a fair sense be remunerative, and not merely nominally so.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

TAXES—TAX-EXEMPT PROPERTY—CHARITABLE ORGANIZATIONS—CONSTITUTIONAL LAW—INCIDENTAL USE OR INCOME—REVENUE—*Creel vs. The Pueblo Masonic Building Association*—No. 13918—*Decided April 4, 1937*—*District Court of Pueblo County*—*Hon. John H. Voorhees, Judge*—*Reversed.*

FACTS: The association, or plaintiff, brought an action against Creel in his capacity as County Treasurer of Pueblo County, herein mentioned as defendant, seeking to enjoin him from selling certain property of the association for non-payment of taxes, and to remove the same from the tax roll as exempt from taxation. Plaintiff owned a five-story building, three floors of which are used for rental purposes and which are not directly or even indirectly used by the association for any other purposes than that of producing revenue, the same purpose for which buildings are owned and maintained by private persons and corporations. The situation presents the question whether an admittedly charitable organization deriving revenue not merely incidental to the use and management of property otherwise used for its charitable purposes, but from property used for the sole purpose of producing revenue to be used in carrying out such purposes, is entitled to have property so used exempted from taxation. The case comes under Section 5 of Article X of the Constitution, and Section 7198, C. L. 1921.

HELD: 1. Whether in any given case property is or is not exempt, must be determined by considering all of the facts and circumstances, and the intentions and purposes of those in charge of the institution to which the property belongs respecting the use and occupation of such property.

2. Mere incidental income from property clearly not maintained for the principal objective of producing income does not take it out of the exempt class.

3. If the entire property constitutes a unit, and it is reasonably necessary to effect the objects of the institution, and it is used solely for that purpose, it is exempt from taxation.

4. In the present case it clearly appears that it does not present a case of mere incidental use or incidental income from the property otherwise "reasonably necessary to effect the objects of the institution."

Opinion by Mr. Justice Young.

CONTRACTS—GIFTS—DRAWING OF A LUCKY NUMBER—*Slagle vs. Construction Progress Exposition*—No. 13922—*Decided April 4, 1937*—*District Court of Denver*—*Hon. Robert W. Steele, Judge*—*Affirmed.*

FACTS: Slagle, plaintiff below, sued to replevy an automobile from the defendant corporation. On a motion a verdict was directed in favor of the defendant. Plaintiff now seeks reversal. Plaintiff relies upon the contention that the defendant made a gift to her of the automobile. The gift is asserted to have been effected through the drawing of a "lucky number" from among all the numbers received in connection with admission tickets by the persons visiting the defendant's "fair," where numerous merchants exhibited their wares. The automobile was not to be delivered until the close of the fair. It is admitted that the fair closed without any delivery being made to the plaintiff.

HELD: 1. No contract right could arise out of the situation here presented, lacking as it does all the essential elements of a legal contract.

2. There was no gift, for a gift presupposes an effectual delivery.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

INSURANCE—FAMILY POLICY—MEMBER OF THE FAMILY—EVIDENCE—ADMISSION OF TESTIMONY—*International Service Union Company vs. Espinoza*—No. 13981—*Decided April 4, 1937*—*District Court of Conejos County*—*Hon. John I. Palmer, Judge*—*Affirmed.*

FACTS: Espinoza sued the company for $800 on the death of his daughter, Stella, under a family policy of insurance. The policy "includes all members of the immediate family named herein." It makes but two exceptions, sons or daughters who marry are automatically excluded. If husband and wife separate, the company reserves the right, "by sending them written notice" to cancel as to any or all members. The parents did not separate, no attempt to cancel was made, and Stella did not marry. The company contends that inasmuch as Stella had left home and entered upon a course of training or probation preparatory to becoming a Carmelite Nun, she was not a member of the family.

HELD: 1. The policy must be construed most strongly against the company which wrote it, and the company's contention is without merit.

2. If improper testimony is admitted in evidence, the court is presumed to have disregarded it.

3. If no objection was made to an order dispensing with the motion for a new trial, it cannot later be presumed to be prejudicial.

Opinion by Mr. Chief Justice Burke. Mr. Justice Knous and Mr. Justice Holland concur.

WILLS—ORAL AGREEMENTS TO MAKE WILLS—CONSTRUCTIVE TRUST—EQUITY—STATUTE OF FRAUDS—RESULTING TRUSTS—PAROL TESTIMONY—MUTUAL WILLS—COSTS—*Re: Estate of Doerfer vs. Rolf et al.*—No. 14040—*Decided April 4, 1937—District Court of Arapahoe County—Hon. H. E. Munson, Judge—Affirmed.*

HELD: 1. Where mutual or reciprocal wills have been made pursuant to an oral agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor or may be enforced in equity against his estate, notwithstanding the fact that he has by will distributed the estate otherwise.

2. Where the caveat makes all of the formal allegations which are required by Section 5211, C. L. 1921, by alleging objections of the first class: those pertaining to the issue as to whether the will filed for probate is the last will of the testator, as is the situation here, there is no object in requiring the pleader to reaffirm, by reference or otherwise, these formal matters and to properly plead the objections of the second class: those relating to the legality of the contests of the will submitted.

3. Under Supreme Court Rule 8, an objection not presented to the lower court in the motion for a new trial is in the Supreme Court precluded. The Supreme Court must pass upon the cases brought to it upon the basis of the record and proceedings in the trial court.

4. Where the evidence on a question is clear, convincing and uncontradicted, the court, if it so desires, is justified in taking the question from the jury and directing a verdict upon the issue.

5. Costs are properly taxed against the losing party.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Holland concur.

CONTRACT—MODIFICATION OF—WAIVER—EVIDENCE—INSTRUCTIONS—JURY—DISPUTED QUESTIONS—*Jensen vs. Bohm Memorial Co.*—No. 13799—*Decided April 5, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Affirmed.*

FACTS: Plaintiff in error is seeking reversal of a judgment of $1,100 entered against her in favor of defendant in error upon a jury verdict. This amount was alleged to be due as the balance of the contract price for a marble memorial statue placed in her home, upon her order, by defendant in error. Herein reference will be made to the parties as plaintiff and defendant. Plaintiff was employed by defendant upon written contract to erect in defendant's home a memorial of Italian marble in likeness of a bronze statue located on the Mullen plot in Mount Olivet Cemetery. $500 was paid at the execution of the agreement, the balance of $1,100 to be paid upon completion of the work. The contract provided that no modifications would be recognized unless

the same is in writing, signed by the parties thereto. Subsequent modifications as to the statue, which were made at the defendant's request, were written in the carbon copy of the original contract delivered to defendant, and signed by Anton Bohm, president of the plaintiff company, but not signed by defendant. When the statue was placed in defendant's home, she signed the following receipt: "One 'Christ' marble statue, Received in good condition as per contract." Defendant at the time said: "I think that it is a beautiful statue of 'Christ.'" The evidence discloses that the statue and base were not of the exact dimensions stipulated in the original contract. The modified contract upon which plaintiff relies permitted some variation; the variation in the statue was from one to three inches as to the height of the statue and size of the base.

HELD: 1. The disputed question was submitted to the jury on instructions which were manifestly fair, and their finding that the modified instrument was the ultimate contract between the parties; that defendant waived the signing thereof; that she consented to the modification; and that there was a full compliance by plaintiff with the terms of the final contract, are conclusive in the matter.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.
